

**STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION**

UNITED STATES SURGICAL	)	
CORPORATION and	)	
MALLINCKRODT LLC	)	
	)	APPELLANTS' MEMORANDUM
CONCERNING A CHLOR-ALKALI	)	REGARDING INTERVENTION AND
MANUFACTURING FACILITY IN	)	PETITIONS FOR LEAVE TO INTERVENE
ORRINGTON, PENOBSCOT COUNTY,	)	OF TOWN OF ORRINGTON, MAINE
MAINE	)	PEOPLE'S ALLIANCE AND HEATHER
	)	FOSTER
PROCEEDINGS UNDER 38 M.R.S.A	)	
§ 1365, UNCONTROLLED HAZARDOUS	)	
SUBSTANCE SITES LAW	)	

The position of Appellants United States Surgical Corporation and Mallinckrodt LLC (hereinafter collectively "Mallinckrodt") with regard to the requests for intervention of the Town of Orrington ("Town"), Maine Peoples Alliance ("MPA") and Heather Foster ("Ms. Foster") in the instant appeal is as follows:

1. The Department of Environmental Protection ("DEP" or "Department")<sup>1</sup> has failed to adopt rules of practice mandated by the Maine Administrative Procedures Act ("APA") governing adjudicatory hearings and therefore the Board of Environmental Protection (the "BEP" or "Board") cannot move forward with any aspect of this proceeding -- including intervention -- in the absence of such rules.
2. The Board itself has failed to adopt rules defining the procedures and scope of participation for intervenors in hearings before the Board as mandated by 38 M.R.S.A. § 345-A(2-A).
3. Assuming, *arguendo*, that the Board decides to reject Mallinckrodt's position regarding failure to adopt procedural rules generally or specifically with regard to intervention, for the reasons stated below, Mallinckrodt supports the Town's Petition for Leave to Intervene, generally does not oppose MPA's intervention on certain limited issues and opposes the request for intervention by Ms. Foster.

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<sup>1</sup> The DEP consists of the Commissioner of the Department of Environmental Protection and the Board of Environmental Protection. See 38 M.R.S.A. § 341-A(2)

## **I. BACKGROUND**<sup>2</sup>

On December 5, 2008 the Department served on Mallinckrodt a unilateral administrative compliance order (the “Order”) under 38 M.R.S.A. § 1365(1) requiring, *inter alia*, an “excavation and removal” remedy requiring that Mallinckrodt excavate contaminated soils, including five on-Site landfills, and haul those soils to Canada for disposal. On the same day the Department served the Order, December 5, 2008, Mallinckrodt filed a lawsuit against the Commissioner and the Department in the United States District Court for the District of Maine asserting due process violations and other claims and seeking a temporary restraining order.

On December 16, 2008, the Commissioner issued a letter waiving certain requirements of the Order, which addressed some of the due process violations raised in Mallinckrodt’s lawsuit. In particular, the Commissioner’s letter stayed all compliance deadlines contained in the Order until the Board issued a final decision on appeal. The Commissioner’s letter also provided that no penalties for noncompliance with any deadline would accrue during the period prior to a final BEP ruling on any appeal of the Order by Mallinckrodt, and that the Department will recommend to the Board that the Board reset all compliance deadlines when the Board finally decides the appeal.

On December 19, 2008, Mallinckrodt filed its appeal with the Board pursuant to 38 M.R.S.A. § 1365(4) (the “Appeal”). On that same day, Mallinckrodt requested a stay of the Appeal pending the outcome of the federal lawsuit filed earlier that same week. On January 9, 2009, the State filed a letter opposing the request for stay. Meanwhile, on December 31, 2008,

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<sup>2</sup> Additional background regarding the site and Mallinckrodt’s appeal can be found in Mallinckrodt’s December 19, 2008 Notice of Appeal and Request for Hearing on Designation of Uncontrolled Hazardous Substance Site and Order and Appellants’ Motion To Dismiss Compliance Order Or, In The Alternative, Stay Proceeding For Failure To Adopt Rules Of Practice In Violation Of The Maine Administrative Procedures Act (filed simultaneously herewith).

the State had moved to dismiss the federal lawsuit arguing, primarily, that the Court should invoke *Younger* abstention in light of the ongoing state administrative proceeding.

On January 19, 2009, the Board issued a First Procedural Order, granting Mallinckrodt's request for a stay but only "until the U.S. District Court rules on the Commissioner's motion to dismiss . . . ." After a hearing on May 4, 2009 in Bangor, U.S. District Judge Woodcock issued a May 20, 2009 Order granting the State's motion to dismiss without prejudice "[b]ecause the elements mandating *Younger* abstention are satisfied and no exception applies." The Court then went on to dismiss the matter on the narrow grounds of abstention, noting that it did so "before reaching the merits of Mallinckrodt's suit."

On May 29, 2009, the Board issued a Second Procedural Order that, among other things, lifted the January 19, 2009 Stay, provided for public notice of the proceedings, set a June 10, 2009 deadline for requests to intervene, established a June 15 deadline for response to any such petitions, and scheduled a pre-hearing conference for June 26, 2009.

## **II. ARGUMENT**

### **A. The DEP Has Failed To Adopt Mandatory Rules Of Practice For Adjudicatory Hearings.**

As an initial matter, the DEP has a non-discretionary duty to adopt rules of practice governing all adjudicatory hearings within its purview; this statutory requirement mandates promulgation of rules for, among other things, adjudicatory proceedings under the Uncontrolled Hazardous Substance Site Act (the "Act"). See 5 M.R.S.A. § 8051 ("[E]ach agency shall adopt rules of practice governing the conduct of adjudicatory proceedings, licensing proceedings . . ."). The Department has failed to adopt such rules of practice with regard to procedures that govern appeals of Department orders under 38 M.R.S.A. § 1365(4). As a result, until those rules are promulgated, it is premature to move forward with any aspect of this proceeding, including with

regard to intervention proceedings. Hence, for the reasons articulated in Appellants' Motion To Dismiss Compliance Order Or, In The Alternative, Stay Proceeding For Failure To Adopt Rules Of Practice In Violation Of The Maine Administrative Procedures Act (filed simultaneously herewith), offering the ability to petition to intervene in the absence of procedural rules violates the APA. Ruling on any petitions to intervene is also, at best, premature. Mallinckrodt therefore respectfully requests that the Board: (1) not rule on the instant petitions for intervention; and (2) stay the proceedings until the Department proposes, and the Board adopts, applicable rules of procedure.

**B. The BEP Has Failed To Adopt Mandatory Rules Defining Intervenor Procedures And Scope Of Participation.**

Board proceedings are subject to a number of requirements. 38 M.R.S.A. § 345-A. Particular to these circumstances, 38 M.R.S.A. § 345-A(2-A) states that "[t]he Board shall adopt rules that define the procedures and scope of participation for intervenors." The Board has yet to adopt any intervention rules for appeal hearings under 38 M.R.S.A. § 1365(4).

"In the absence of regulations, there [is] not a reliable set of criteria upon which anyone [can] act." *See Washington County Cease, Inc. v. Persico*, 465 N.Y.S.2d 965, 978-79 (S.Ct.1983) *aff'd* 473 N.Y.S.2d 610, 614 (3d Dept.1984). Without BEP rules defining procedures and scope of intervention, the Board has neither the criteria to judge petitions to intervene nor the tools of procedure to properly evaluate the petitions to intervene in this matter. Especially in a hearing that operates as an adjudicatory proceeding in the nature of an appeal, as is the case here, the interests of justice demand that adequate rules outlining the role of intervenors be concretely established prior to initiating any procedural or substantive aspects of the hearing.

In the absence of duly adopted rules defining the role and procedure of intervenors, the Board cannot lawfully allow intervention in this proceeding.<sup>3</sup>

**C. BEP Reliance Upon Maine APA Standards, While Erroneous, Augers for Accepting Intervention by the Town, Limiting Intervention by MPA and Rejecting Intervention by Ms. Foster.**

Assuming, *arguendo*, that the Board rejects Mallinckrodt's position regarding failure to adopt procedural rules generally or specifically with regard to intervention, Mallinckrodt supports the Town's Petition for Leave to Intervene, generally does not oppose intervention on limited issues of the MPA and opposes the request for intervention by Ms. Foster.

Under the APA rules governing public participation,<sup>4</sup> an agency conducting a hearing may allow for intervention pursuant to agency rules as follows:

**1. Intervention.** On timely application made pursuant to agency rules, the agency conducting the proceedings shall allow any person showing that he is or may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding, or any other agency of federal, state or local government, to intervene as a party to the proceeding.

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**4. Consolidation of presentations.** Where appropriate, the agency may require consolidation of presentations of evidence and argument by members of a class entitled to intervene under subsection 1, or by persons allowed to intervene under subsection 2.

5 M.R.S.A. §9054(1) and (4). Under this standard, the individual or entity must be "substantially and directly affected by the proceeding."

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<sup>3</sup> In other contexts, such as licensing proceedings, the Department and the Board have recognized the need for, and have duly promulgated, procedural rules regarding intervention. *See, e.g.*, Chapter 30 of the DEP's rules concerning Special Regulations for Hearings on Applications of Significant Public Interest.

<sup>4</sup> As noted in Appellants' Motion To Dismiss Compliance Order Or, In The Alternative, Stay Proceeding For Failure To Adopt Rules Of Practice In Violation Of The Maine Administrative Procedures Act (filed simultaneously herewith), pursuing this appeal hearing in the absence of applicable procedural rules promulgated by the Board is a violation of the Maine APA. Mallinckrodt advances this portion of its position, and references the intervention procedures outline in the APA, solely for purposes of preserving its rights in the event that the Board moves forward with the instant proceeding in the absence of duly promulgated applicable procedural rules.

i) **The Town Of Orrington Is Substantially And Directly Affected By The Proceeding And Should Be Allowed To Intervene On All Aspects Of The Proceedings**

The Town is the current owner of all of the real estate and associated structures that make up the former HoltraChem Manufacturing Company Site. The Order as currently written requires Mallinckrodt to undertake significant activities on the Site, activities that will require the Town's permission for Mallinckrodt (and its contractors and consultants) to have access to the property for many years. Further, the DEP's proposed remedy would require significant excavation and hauling of on-Site contaminated media. In addition, that remedy may cause potential releases into the community of airborne mercury emissions during the excavation of mercury contaminated soils, as well as tens of thousands of truckloads of such contaminated soils being transported from the Site through the Town of Orrington. These are all issues of significant importance to the Town as well as to Mallinckrodt, and absent a change in ownership of the Site, Mallinckrodt would support intervention of the Town.

ii) **While The Interests Of MPA Will Be Adequately Addressed By DEP And The Town, Mallinckrodt Does Not Object To MPA Being Allowed To Intervene Regarding Certain Limited Aspects Of The Proceedings.**

a. **MPA's Role Should Be Limited Pursuant To Section 9054(4) Because Its Interests Are Adequately Represented By Both The DEP And The Town of Orrington.**

MPA states in its June 10, 2009 petition to intervene that it has been involved with the Site since 1988, lists a number of activities it has undertaken since that time, and states that it will bring a "historic perspective" to the proceedings. However, MPA is a relative newcomer to the Site as compared with DEP and Mallinckrodt. For over twenty-five years, Mallinckrodt has participated in and funded an ongoing investigation and clean-up process at the Site under the oversight of the United States Environmental Protection Agency and the DEP. The Site has been

managed under the federal Resource Conservation and Recovery Act (“RCRA”) corrective action program since the mid-1980s (via a consent agreement) and has been the subject of a RCRA Consent Decree since 1993. DEP has worked very closely with Mallinckrodt as it implemented the requirements of those legally binding agreements. Therefore, the “historic perspective” regarding the site that MPA says it will bring to the appeal proceeding is not unique, nor is it nearly as robust as the DEP’s long-term experience regarding the Site.<sup>5</sup>

MPA also states that as an intervenor, it will discuss the “nature of the pollution” at the Site. However, the appeal hearing will involve presentation, review and analysis of decades of scientific, technical, and engineering information involving landfill engineering, hydrogeology, air modeling, and risk assessment, among other disciplines. DEP and Mallinckrodt have been working with all of the relevant information over this extended time period. MPA has not undertaken any Site-specific investigation of the former HoltraChem Site itself, and has not identified any technical experts that that would assist the Board in its evaluation of the Site and the remedy. MPA has not demonstrated that it is qualified and armed with the requisite knowledge and technical ability to discuss the nature of the pollution at the Site, or that it would bring any unique perspective if it were.

MPA also states that as an intervenor, it will provide citizen testimony and a historic perspective to the “pollution problem.” Yet the Town has been, by the nature of its location and populace, a party intimately involved in the ongoing clean-up process at the Site. MPA members are Orrington residents, and the Town’s Petition for Intervention itself speaks to all of the issues raised by MPA’s letter seeking intervention: historical perspective on the site, nature of the

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<sup>5</sup> DEP’s 40-page Order with 369 exhibits illustrates the breadth of historical and scientific information that will be presented at the hearing.

pollution remaining on the site, nature of the remedy (both excavation and transportation desires and concerns) and timing of the remedy.

Last, this situation is different than the so-called River Litigation in which MPA is a party. In that case, MPA submitted a notice of intent to sue to the U.S. EPA, providing EPA with an opportunity to pursue HoltraChem and Mallinckrodt for alleged mercury contamination in the Penobscot River. When EPA did not proceed with that action within the prescribed time period, MPA then proceeded with its own citizens' suit. Here, DEP (and before it, EPA) have proceeded in a robust fashion regarding investigation, study and pursuit of remedial activity at the Site.

In sum, the DEP and the Town will adequately represent MPA's interests before the Board. Allowing MPA to participate in all aspects of the proceedings will be redundant and add unnecessary delay, cost and confusion to an already complicated matter.

b. Limited Intervention by MPA is Appropriate on the Issues of Excavation and Transportation

The Order requires that hundreds of thousands of tons of contaminated soil be excavated from the Site, and that such soil be transported from the Site to various distant (out-of-state) disposal facilities. To the extent that MPA can show that it has members (a) living in the immediate area of the site such that they may be impacted by airborne emissions of mercury created by excavation of contaminated soils, or (b) living along soil disposal transportation routes, MPA should be allowed to participate in the proceedings to the extent that those matters come before the Board. As may be ordered by the Board under 38 M.R.S.A. § 9054(4), however, MPA's participation on those issues (i.e., presentations of evidence and argument) should be consolidated with that of DEP and the Town.



iii) **Heather Foster Should Not Be Granted Separate Intervenor Status As She Will Not Be Substantially and Directly Affected by the Proceeding, Her Relevant Interests Will Be Covered By DEP and the Town, And Most of the Interests She Expresses Are Outside the Scope of the Proceedings.**

- a. Ms. Foster has not sufficiently shown that she will be substantially and directly affected by the appeal hearing.

Ms. Foster asserts that she may be directly and substantially affected by the outcome of the appeal hearing due to her association with a number of class groups, *i.e.*, her status as a Town of Orrington citizen, a parent of children residing in Orrington, an individual potentially sensitive to chemicals, a U.S. citizen with civil rights claims against Mallinckrodt, a taxpayer and as a healthcare recipient and payer. *See* June 10, 2009 email request for intervenor status of Heather Foster. Despite this wide ranging self-classification, Ms. Foster does not offer anything other than vague generalities as to any direct and substantial relationship to the outcome of the Board's appeal hearing. Moreover, what testimony she proposes to give, on the subject of monitoring public health "outcomes" and reporting on health "outcomes" is outside the scope of the Order. Because Ms. Foster has outlined her interest in the matter and the areas of proposed testimony in a manner that appears largely unrelated to the specific subject-matter of the Appeal, her concerns are not directly and substantially related to the appeal proceeding and therefore her request to participate as an intervenor should be denied.

- b. Ms. Foster's interests are adequately represented by both the DEP and the Town.

Ms. Foster states that she will present arguments relating to health monitoring, which she will support by presenting statements by public health professionals, research scientists, medical representatives and the state toxicologist. Ms. Foster's interests in that regard, however, are very general contentions which directly overlap with that of the DEP. The Department is the lead

agency representing the public's interest with this Order and at the appeal hearing. Her concerns regarding impacts to public health from the Site will be adequately presented and supported by the DEP.

As a Town resident, Ms. Foster's interest also will be adequately represented by the Town. Her testimony would, apparently, overlap with the Town's presentation regarding the "impact of the contaminated site," and the impact of the proposed clean-up and the proposed Remediation Plan. Therefore, her participation as a formal intervenor with regard to those issues is unnecessary and, at best, duplicative. Hence her request for intervenor status should be denied.

c. Ms. Foster advances interests that are outside the scope of the BEP's jurisdiction.

Ms. Foster's petition raises issues that clearly exceed the scope of the Act. She asserts "potential" chemical sensitivity to mercury, and that she will be presenting evidence on conflicts of interest between "the operators of the chemical plant, their documented legal representatives, and the local healthcare corporation and its affiliates," civil rights violations, taxpayer rights, and health care payment concerns. Ms. Foster also indicates that she will be presenting evidence on some component of wholly unrelated federal law, such as "Title 18 and other sections of the US Code and Sarbanes-Oxley" in order "to assure adequate oversight of remediation." It is clear that none of these areas are within the scope of the proceedings contemplated by the Board, and, Ms. Foster should not be granted intervenor status in this matter.

### **III. CONCLUSION**

For the foregoing reasons, Mallinckrodt respectfully requests that the Board stay the appeal hearing until the DEP adopts rules of practice governing 38 M.R.S.A. § 1361 *et seq.* In


addition, Mallinckrodt requests that the Board stay the proceeding until such time as the Board has promulgated rules defining its procedures and the scope of participation for intervenors, as required by 38 M.R.S.A. § 345-A(2-A).

In the event that the Board rejects Mallinckrodt's requests regarding the promulgation of procedural and intervention rules, Mallinckrodt requests that the Board:

- A. Grant the Town of Orrington's Petition for Leave to Intervene;
- B. To the extent that it can show that it has members (a) living in the immediate area of the site such that they may be impacted by airborne emissions of mercury created by excavation of contaminated soils, and (b) living along soil disposal transportation routes, grant MPA the right to participate in the proceedings to the extent that those specific matters come before the Board; and
- C. Deny the request for intervention of Heather Foster.

Dated at Portland, Maine this 15th day of June, 2009.

Respectfully Submitted,

  
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